

Summary: The Plaintiff filed an ex parte motion temporary restraining order, arguing that the Defendants should be enjoined from interfering with the Plaintiff's access to and possession of the Plaintiff's property. The court granted the motion, finding that the Dataphase factors for issuance of a temporary restraining order were satisfied.

Case Name: Gustafson v. Poitra, et al.

Case Number: 4-09-cv-16

Docket Number: 7

Date Filed: 4/15/09

Nature of Suit: 230

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION**

Darrel Gustafson,)	
)	
Plaintiff,)	ORDER GRANTING EX PARTE
)	TEMPORARY RESTRAINING ORDER
vs.)	
)	
Sandra Poitra, All Persons Unknown)	Case No. 4:09-cv-016
claiming any estate or interest in, or lien)	
or encumbrance former Belcourt Lumber)	
Yard adjacent to the One Stop Market,)	
Turtle Mountain Tribal Court, and Bureau)	
of Indian Affairs,)	
)	
Defendants.)	

Before the Court is the Plaintiff's "Motion for Ex Parte Temporary Restraining Order" filed on April 8, 2009. The Plaintiff seeks a temporary restraining order enjoining and restraining the Defendants, and any person or entities acting in concert with or on behalf of the Defendants, from interfering with the Plaintiff's access to and possession of the following fee land located in Rolette County, North Dakota, within the Turtle Mountain Indian Reservation:

Parcel 1: That part of the NW1/4NW1/4, Section 29, Township 162 N., Range 70 W., 5th P.M., described as commencing at the common Section corners of Sections 19, 20, 29 and 30, Township 162 N., Range 70 W., thence South 89°58' East on the

Section line between Sections 20 and 29 a distance of 1320.0 feet; thence south 0°04' East a distance of 530.0 feet to the South right of way line of State Highway No. 5 and 281 being the point of beginning; thence South 0°04' East a distance of 875.05 feet to the Southeast Corner of said NW1/4NW1/4; thence North 89°58' West a distance of 550.0 feet; thence North 0°04' West a distance of 510.05 feet to the south right of way line of State Highway No. 5 and 281; thence North 55°52' East a distance of 660.0 feet along the State Highway 5 and 281 right of way line back to the point of beginning, comprising 10.0 acres more or less.

Parcel 2: A parcel of land lying in the NW1/4NW1/4, Section 29, Township 162 N., Range 70 W. described as follows: Beginning at the SW Corner of said NW1/4NW1/4 thence East of forty-line to a point which is 550 feet West of the East line of said NW1/4NW1/4, thence North to the intersection with the South right-of-way line of State Highway No. 5, thence Southwesterly along said highway right-of-way line to intersection with the West line of said NW1/4NW1/4, thence South on forty-line to said point of beginning, subject to all valid outstanding easements and rights-of-way of record.

(Parcel 1 and Parcel 2, taken together, are also known as that part of the NW1/4NW1/4 lying South of the Highway Right-of-Way of State Highway Number 5).

I. BACKGROUND

In December 1993, the United States Small Business Association took a mortgage on real property owned by Raymond Poitra. The real property is described above as Parcels 1 and 2. The mortgage was assigned to the plaintiff, Darrel Gustafson, in May 2005. In 2006, Gustafson commenced a foreclosure action in North Dakota state district court. The foreclosure action was duly noticed and published in accordance with North Dakota law. In August 2007, the state district court granted Gustafson's motion for summary judgment. In September 2007, final judgment was entered on the foreclosure action. Raymond Poitra appealed the state district court's judgment to the North Dakota Supreme Court. The North Dakota Supreme Court affirmed the judgment on August 28, 2008. See Gustafson v. Poitra, 755 N.W.2d 479 (N.D. 2008).

It is believed that at some point during the redemption period, defendant Sandra Poitra, the sister of Raymond Poitra, moved into a house located on the property. Sandra Poitra is an enrolled member of the Turtle Mountain Band of Chippewa Indians (Tribe). Sandra Poitra never appeared in the foreclosure action and has never been an owner of record of the property.

On November 17, 2008, Gustafson, who is not a member of the Turtle Mountain Band of Chippewa Indians, was issued a Sheriff's Deed for the property and, thus, became the owner of the property. On November 22, 2008, Gustafson served Sandra Poitra with a letter that notified her that he is the owner of the property and provided her with a copy of the Sheriff's Deed. In the letter, Gustafson's counsel informed Sandra Poitra that:

Mr. Gustafson is willing to sell you the house for one dollar, if you move the house from the property. If you do not want to move the house, you need to immediately vacate the house. I would ask that you make immediate plans to vacate or move the house. If you do not vacate or remove the house and all your personal property from the property by December 31, 2008, Mr. Gustafson will begin eviction proceedings.

When Sandra Poitra did not leave the property, Gustafson served her with a Notice to Quit and Vacate on January 24, 2009. Sandra Poitra remained on the property. On March 21, 2009, Gustafson served Sandra Poitra with a summons and complaint in North Dakota state district court. On March 30, 2009, a hearing was scheduled before Judge Michael G. Sturdevant. Sandra Poitra did not appear in person and did not file any pleadings in the action.

On March 30, 2009, Judge Sturdevant issued Findings of Fact, Conclusions of Law, and an Order for Judgment. Judge Sturdevant concluded that Gustafson became the owner of the property on November 17, 2008, when he was issued the Sheriff's Deed, and that Sandra Poitra is "wrongfully in possession of the . . . property and has no permission to be on the property and has refused to surrender possession of the property." Judge Sturdevant entered judgment in favor of

Gustafson and issued a writ of eviction requiring Rolette County Sheriff Tony Sims to remove Sandra Poitra and her personal property from the property by 5:00 p.m. on April 3, 2009. On April 1, 2009, Sheriff Sims attempted to serve the writ of eviction on Sandra Poitra but she refused service.

Sandra Poitra then filed a petition for a restraining order with the Turtle Mountain Tribal Court in which she argued that the Tribal Court has jurisdiction over her and non-members Gustafson and Sheriff Sims. Sandra Poitra contended the house was gifted to her in 2003 and that she “is being harassed, tormented and under attack and therefore is begging the Turtle Mountain Tribal Court for a Restraining Order to protect her from” Darrel Gustafson, Sheriff Sims, Gustafson’s counsel, and the state district court. Poitra moved the Tribal Court to order Gustafson, Sheriff Sims, Gustafson’s counsel, and the state district court “to cease and desist from serving state authorized processes on Tribal Lands.”

On April 1, 2009, the Turtle Mountain Tribal Court issued a temporary restraining order which restrained Gustafson and Sheriff Sims:

1. From any contact with [Sandra Poitra] or any member of [her] family or through any third party, for the purpose of bothering, annoying, or harassing [Poitra].
2. From making any telephone calls, e-mails, letters for the purpose [of] annoying [Sandra Poitra] or any member of [her] family, at [her] home or place of employment.
3. From any other action as directed from this court.

Gustafson and Sheriff Sims were ordered to appear before the Tribal Court on April 14, 2009, to show cause why the temporary restraining order should not be made permanent. The show cause hearing was rescheduled for April 23, 2009. The Tribal Court informed Gustafson and Sheriff Sims that violating the order may result in forty-five days in jail and/or a \$500.00 fine. On April 2, 2009,

Elmer J. Four Dance, a special agent with the Bureau of Indian Affairs, indicated the Bureau of Indian Affairs will not enforce the state court's writ of eviction.

On April 8, 2009, Gustafson filed a complaint in federal court in which he brought claims for declaratory judgment, injunctive relief, and a writ of assistance. Gustafson contends that as a non-member he is outside the criminal jurisdiction of the Turtle Mountain Tribal Court and cannot be imprisoned by the Tribe. Gustafson contends he is the owner of the property and is entitled to exclusive possession of the property. Gustafson further contends the Defendants have interfered with his right to exclusive possession of his property by, among other things, "refusing to allow [him] possession of the property, ejecting [his] contractors from the property, refusing service from [the] Rolette County Sheriff, refusing to vacate the property," "taking legal action in Turtle Mountain Tribal Court," and "issuing an ex parte restraining order preventing [him] from contacting Defendant Sandra Poitra under threat of imprisonment and fine."

Gustafson seeks a declaration from the Court as to the parties' "rights and legal relations and a determination of jurisdiction over non-Indian owned fee land within the confines of the Turtle Mountain Indian Reservation" In essence, Gustafson contends that this Court, and not the Tribal Court, has jurisdiction and should resolve this dispute.

II. LEGAL DISCUSSION

Darrel Gustafson seeks a temporary restraining order enjoining and restraining the Defendants from interfering with his access to and possession of the above-described real property. Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, in determining whether a temporary restraining order should be issued, the Court must look to the specific facts shown by an affidavit

or verified complaint to determine whether immediate and irreparable injury, loss, or damage will result to the movant. Applications for temporary restraining orders and preliminary injunctions are measured against the same factors. Wachovia Securities, L.L.C. v. Stanton, 571 F. Supp. 2d 1014, 1031 (N.D. Iowa 2008). In determining whether a temporary restraining order or preliminary injunction should be issued, the Court is required to consider the factors set forth in Dataphase Sys., Inc., v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981). The Court must consider “(1) the movant’s probability or likelihood of success on the merits, (2) the threat of irreparable harm or injury to the movant absent the injunction, (3) the balance between the harm to the movant and the harm that the injunction’s issuance would inflict on other interested parties, and (4) the public interest.” Wachovia Securities, L.L.C., 571 F. Supp. 2d at 1032 (citing Dataphase Sys., Inc., 640 F.2d at 114).

It is well-established that the burden of establishing the necessity of a temporary restraining order or a preliminary injunction is on the movant. Baker Elec. Co-op., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994); Modern Computer Sys., Inc. v. Modern Banking Sys., Inc., 871 F.2d 734, 737 (8th Cir. 1989). “No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.” Baker Elec. Co-op., Inc., 28 F.3d at 1472 (quoting Calvin Klein Cosmetics Corp. v. Lenox Lab., Inc., 815 F.2d 500, 503 (8th Cir. 1987)).

A. PROBABILITY OF SUCCESS ON THE MERITS

When evaluating a movant’s “probability or likelihood of success on the merits” the Court should “flexibly weigh the case’s particular circumstances to determine ‘whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo

until the merits are determined.” Calvin Klein Cosmetics Corp., 815 F.2d at 503 (quoting Dataphase Sys., Inc., 640 F.2d at 113). At this preliminary stage, the Court does not decide whether the party seeking the temporary restraining order will ultimately win. PCTV Gold, Inc. v. SpeedNet, LLC, 508 F.3d 1137, 1143 (8th Cir. 2007). Although a temporary restraining order cannot be issued if the movant has no chance on the merits, “the Eighth Circuit has rejected a requirement as to a ‘party seeking preliminary relief prove a greater than fifty per cent likelihood that he will prevail on the merits.’” Id. (quoting Dataphase Sys., Inc., 640 F.2d at 113). The Eighth Circuit has held that of the four factors to be considered by the district court in deciding on preliminary injunctive relief, the “likelihood of success on the merits is most significant.” S & M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).

Gustafson contends he is likely to prevail on the merits of his declaratory judgment claim. Gustafson seeks declaratory relief under the Declaratory Judgment Act codified at 28 U.S.C. § 2201. The Declaratory Judgment Act authorizes a court to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201. “Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.” Wilton v. Seven Falls Co., 515 U.S. 277, 286 (1995).

Any willingness to entertain declaratory relief in this case would yield to the applicability of the tribal exhaustion doctrine. See Gaming World Int’l, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 849 (8th Cir. 2003) (“The issue of tribal exhaustion is a threshold one because it determines the appropriate forum.”). Because Gustafson seeks a declaration from the Court as to the parties’ rights and legal relations and a determination of jurisdiction over fee land within the

confines of the Turtle Mountain Indian Reservation that is owned by a non-member, his probability of success on the merits is based on an analysis of tribal jurisdiction.

Pursuant to 28 U.S.C. § 1331, this Court is empowered to determine whether a tribal court has exceeded the lawful limits of its jurisdiction. Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 853 (1985). “The question of whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a ‘federal question’ under § 1331.” Id. at 852.

An analysis of the Tribal Court’s jurisdiction starts with the United States Supreme Court’s decision in Montana v. United States, 450 U.S. 544 (1981), a “pathmarking case concerning tribal civil authority over nonmembers.” Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997). The Supreme Court in Montana specifically addressed the reach of tribal jurisdiction over non-Indian parties. In Montana, the Supreme Court announced the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe. However, Indian tribes retain sovereignty over non-members in two specific instances:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

450 U.S. 544, 565-66 (internal citations omitted). The Supreme Court further explained the Montana rule in Strate, 520 U.S. at 446:

Montana thus described the general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health or welfare.

In this case, the Turtle Mountain Tribal Court does not have civil jurisdiction over Gustafson unless one of the two recognized Montana exceptions is applicable. With respect to the first Montana exception, the Turtle Mountain Tribal Court has jurisdiction over Gustafson if he entered into "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Gustafson contends the Defendants and the Tribe do not have an agreement with Gustafson that allows Sandra Poitra to be on the property, and the Tribe is a stranger to the property because it is fee land.

In Strate, 520 U.S. at 457, the United States Supreme Court listed cases that fit within the first Montana exception: Williams v. Lee, 358 U.S. 217, 223 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of an on-reservation sales transaction between a non-member plaintiff and member defendants); Morris v. Hitchcock, 194 U.S. 384 (1904) (upholding tribe's permit tax on non-member-owned livestock within reservation boundaries); Buster v. Wright, 135 F. 947 (8th Cir. 1905) (upholding tribe's permit tax on non-members for the privilege of conducting business within the tribe's borders); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (tribe's authority to tax on-reservation cigarette sales to non-members "is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status").

The Court finds it probable that the first Montana exception does not apply. At this early stage, there does not appear to be evidence that Gustafson has entered into a consensual relationship with the Turtle Mountain Band of Chippewa Indians or Sandra Poitra regarding the property at issue. There have been no commercial dealings, contracts, leases, or other arrangements among the parties to this action. When compared to the cases listed in Strate, this case does not appear to present a consensual relationship “of the qualifying kind.” See Strate, 520 U.S. at 457. At most, this appears to be a property dispute between two individuals. Additionally, the issue seems to have arisen due to the absence of a contract, lease, or other arrangement.

With respect to the second Montana exception, the Turtle Mountain Tribal Court retains jurisdiction over Gustafson if his conduct has threatened or had some direct effect on the political integrity, economic security, or health or welfare of the tribe. “The exception is only triggered by *nonmember conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered ‘necessary’ to self-government. Thus, unless the drain of the nonmember’s conduct upon tribal services and resources is so severe that it actually ‘imperil[s]’ the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.” Atkinson Trading Co. v. Shirley, 532 U.S. 645, 657 n. 12 (2001) (emphasis in original). Gustafson contends that regulating the use of his property does not affect the Tribe’s right to self-government. He contends that evicting a trespasser on fee land does not imperil the Tribe’s political integrity and, therefore, the Tribe cannot assert authority over him.

The Court finds it probable that the second Montana exception also does not apply to this matter. At this early stage, there does not appear to be evidence that Gustafson’s conduct – attempting to assert his legal right to his property and attempting to evict a trespasser – threatens or

affects the Turtle Mountain Band of Chippewa Indians or the Turtle Mountain Tribal Court in any way. This appears to be a minor land dispute between a non-member and a tribe member about the tribe member's right, or lack thereof, to live on Gustafson's property. The Tribe's political integrity, economic security, health, and welfare do not appear to be implicated in any manner by a simple land dispute.

Because it is probable that neither Montana exception applies, the Court finds that at this preliminary stage of the litigation, and based on the limited information on file with the Court, Gustafson has established a sufficient likelihood of success on the merits. Accordingly, the Court finds that this factor weighs in favor of the issuance of a temporary restraining order.

B. IRREPARABLE HARM

Gustafson must next establish that there is a threat of irreparable harm if injunctive relief is not granted and that such harm is not compensable by money damages. Doe v. LaDue, 514 F. Supp. 2d 1131, 1135 (D. Minn. 2007). "Possible or speculative harm is not enough." The party that seeks a temporary restraining order must show a significant risk of harm exists. Id. The Eighth Circuit has held that "monetary relief fails to provide adequate compensation for an interest in real property, which by its very nature is considered unique." O'Hagan v. United States, 86 F.3d 776, 783 (8th Cir. 1996).

Gustafson contends that if the Defendants are allowed to continue to prevent him from having exclusive possession of his property, he will suffer irreparable harm. Gustafson contends that since he became the lawful owner of the property, he has not been allowed to use the property because of Sandra Poitra's presence even though he pays taxes and insurance on the property.

Gustafson contends that unless a temporary restraining order is issued, he will be further stripped of his property rights and Sandra Poitra will be allowed to continue to trespass.

The Court finds, at this early stage, that Gustafson has shown he will suffer significant harm to his property rights if he is not allowed to possess his property without interference from the Defendants. The Court further finds that at this preliminary stage of the litigation, Gustafson has established he will likely suffer irreparable harm if a temporary restraining order is not issued, and that he cannot be compensated by money damages. Therefore, this factor weighs in favor of the issuance of a temporary restraining order.

C. BALANCE OF HARM

Gustafson contends that Sandra Poitra has not and will not suffer any harm because she is not the lawful owner of the property and, instead, is a trespasser. Gustafson contends that unless the temporary restraining order is issued, he will be forced to delay development of the property, suffer a costly delay to gaining possession of the property, and continue to pay taxes and insurance on the property. The Court finds that the issuance of a temporary restraining order may harm Sandra Poitra because she will have to find a new residence. However, it appears from the limited record that she does not have a lawful right to remain on the property which significantly minimizes any harm to her. The issuance of a temporary restraining order will prevent harm to Gustafson because it will allow him to have full access to and possession of property he owns. Thus, this factor weighs in favor of the issuance of a temporary restraining order.

D. PUBLIC INTEREST

Gustafson contends that public policy favors the issuance of a temporary restraining order because he is the owner of the property and has the right to the exclusive use and possession of that property. Gustafson cites Article I, §1 of the North Dakota Constitution:

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Gustafson contends that if Sandra Poitra is allowed to continue to remain on the property without permission or a lease, his property rights will mean nothing. At this preliminary stage, this factor arguably weighs in favor of the issuance of a temporary restraining order.

III. CONCLUSION

After carefully reviewing the entire record, the Court finds that the Plaintiff has met his burden of establishing the necessity of a temporary restraining order. The Court **GRANTS** the Plaintiff's "Motion for Ex Parte Temporary Restraining Order."

Based on the foregoing findings and conclusions, it is **ORDERED**:

- 1) That the Defendants, and any persons or entities acting in concert with or on behalf of the Defendants, shall be restrained and enjoined during the pendency of this action from interfering with the Plaintiff's access to and possession of the real property he owns which is located in Rolette County, North Dakota.

- 2) That the Defendants shall appear in Courtroom One of the U.S. District Court for the District of North Dakota, in Bismarck, North Dakota, on Wednesday, April 22, 2009, at 10:30 a.m. to show cause under Rule 65 of the Federal Rules of Civil Procedure why they should not be restrained and preliminarily enjoined during the pendency of this action.
- 3) That the Defendants may at any time file a motion to dissolve or modify this temporary restraining order in accordance with Rule 65 of the Federal Rules of Civil Procedure. If such a motion is not filed within ten (10) days after service of this order, the temporary restraining order shall be deemed consented to based upon the grounds set forth above until further order of the Court.
- 4) No bond shall be required to be posted by the Plaintiff before the temporary restraining order is effective.
- 5) The Plaintiff shall arrange for the immediate service of this order together with the Plaintiff's "Motion for Ex Parte Temporary Restraining Order" and supporting pleadings and affidavits, and shall promptly file proof of service with the Court.

Dated this 15th day of April, 2009.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge
United States District Court